RCR Sportswear, Inc., and its alter egos, In Stitches, Inc., and Anthony Ribaudo and Daniel Ribaudo *and* Local 158, International Ladies Garment Workers Union, AFL–CIO. Case 22–CA–18731

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 5, 1993, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents filed exceptions, a supporting brief, and a reply to the General Counsel's exceptions. The Charging Party filed a letter stating that it joined in the General Counsel's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified, and set forth in full below.[4]

1. The General Counsel has excepted, inter alia, to the judge's failure to find, as alleged in the complaint, that on or about September 14, 1992,[5] Respondent RCR Sportswear, Inc. and its alter ego Respondent In Stitches, Inc. (the Respondent), violated Section 8(a)(3) and (1) by conditioning employees' employment on their working in a nonunion setting, i.e., without the union contract that, as the judge properly found, the Respondent was obligated to keep in effect subject only to the minor modifications made in the chapter 11 proceeding. The judge did not address this complaint allegation. For the reasons set forth below, we agree with the General Counsel that the Respondent constructively discharged employees in violation of Section 8(a)(3) and (1) of the Act. In so finding, we rely primarily on the admissions of the Respondent's two owners, Daniel and Anthony Ribaudo.

Daniel Ribaudo testified that on Friday, September 11, after he found that the chapter 7 bankruptcy filing had been approved, he had a meeting with the employees at which he told them that RCR would be closing down at the end of the day. Daniel Ribaudo further testified that he told the employees they had the option of signing up for unemployment or working for the new company, and that if they came to work for the new company, they would receive the same wages but there would be no benefits. In reply to a question by the judge as to how employees knew that the union contract would not be applied, Daniel Ribaudo responded that ''this is the obvious answer. No benefits means no contract.'' When questioned further, Daniel Ribaudo agreed with the judge ''that that would be a reasonable conclusion [the employees] might come to from the context of the conversation.'' According to Daniel Ribaudo, about three or four employees did not appear for work on Monday, September 14.

Anthony Ribaudo in his affidavit, which was admitted as substantive evidence, stated that when the employees came to work on Monday, he gave them applications, and ''I explained to the employees that they would be paid the same wage and it would be a nonunion factory. I did not tell them that they could not be represented by the ILGWU or any other union.'' The supplemental affidavit of Anthony Ribaudo, which was also admitted as substantive evidence, attests that employee Catherine Onerato told Daniel Ribaudo on Tuesday, September 15, ''that she had to leave; that she couldn't stay; that the Union called a meeting following work the previous day, and the spokesperson told the employees that their benefits would be cut off if they stayed with In Stitches. She quit, along with five others.''

In *Control Services*, 303 NLRB 481, 485 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992), the Board, with court approval, found that employees who quit rather than work under conditions established in derogation of the statutory right to bargain were constructively discharged in violation of Section 8(a)(3) and (1) of the Act. The Board relied on the theory of constructive discharge applicable to employees who quit after being confronted with a choice between resignation or continued employment conditioned on relinquishment of statutory rights.[6]

We find this line of constructive discharge cases to be applicable to the instant case. Here, employees were confronted with the choice of resigning or working under conditions that were established in derogation of their statutory rights. As the alter ego of RCR Sportswear, In Stitches was obligated under the Act to adhere to the collective-bargaining agreement with the

[1] The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We find it unnecessary to rely on the judge's statement in sec. III, par. 16 indicating that holding corporate meetings to make corporate decisions was a formality inappropriate for such a small closed corporation. We also do not rely on the judge's statement in sec. III, par. 19 implying that holding Respondents Anthony and Daniel Ribaudo individually liable for the violations committed by the Respondent Companies would not add anything to the standard remedy appropriate for alter ego cases.

[3] Chairman Stephens agrees that under current Board law the judge was correct in not imposing individual liability on the Ribaudos.

[4] We have amended the judge's recommended Order, inter alia, to conform to the Amended Conclusions of Law and the Amended Remedy, to provide for reinstatement and a make-whole remedy for employees who were constructively discharged, and to direct the Company to remit to the Union the dues which are being held in escrow.

[5] All dates are in 1992 unless otherwise noted.

[6] See also *White-Evans Service Co.*, 285 NLRB 81, 82 (1987).

Union, subject only to the modifications made in the chapter 11 proceeding. Notwithstanding this statutory obligation, Daniel Ribaudo told employees that if they worked for In Stitches they would receive ''no benefits,'' and he admitted that employees would reasonably have understood that comment to mean that the entire collective-bargaining agreement would not be applied.[7] Any doubt on that score was eliminated on the first day of operations when Anthony Ribaudo informed employees that In Stitches ''would be a nonunion factory.''[8] Under these circumstances, we find that employees, such as Catherine Onerato, who quit rather than work under the conditions the Respondent unlawfully imposed, were constructively discharged in violation of Section 8(a)(3) and (1) of the Act.[9]

2. The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) by failing to remit union dues to the Union, because the dues constituted an appropriate and obligatory payroll deduction under the terms of the collective-bargaining agreement to which In Stitches was bound. The General Counsel has excepted to the judge's failure to find additionally that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by deducting union dues from its employees and placing the dues in escrow. The judge did not address these additional allegations.

In December, In Stitches, pursuant to its attorney's advice, withheld union dues from employees for the months of October and November in the amount of $70 per employee and placed them in an escrow account pending the outcome of this case. A notice distributed to employees in their paychecks read as follows:

> Due to a complaint filed by the ILGWU with the National Labor Relations Board a dispute concerning unfair labor practice has resulted. This may [sic] some time to resolve, however it requires that we with hold union dues that would have been paid under the contract. The funds will be held in a bank account [sic] til the dispute is resolved. We will investigate as to whether this entitles former members to any benefits. Sorry for the inconvenience, and thank you for your patience.

The General Counsel argues that the Respondent's action in denying to employees their benefits under the collective-bargaining agreement, while simultaneously deducting a substantial amount of money from their paychecks for dues and blaming it on the Union's filing a charge with the Board, was inherently destructive of employee rights and undermined employee support for the Union.[10] We disagree.

Contrary to the General Counsel, we do not believe that the Respondent's conduct was so inherently destructive of employee rights that under *Great Dane* an unlawful motive can be presumed in the absence of any supporting evidence. The employees did owe dues to the Union, and it was proper for the Respondent to deduct the sums from their paychecks. Accordingly, we turn to the question of whether the record as a whole will support a finding that the Respondent's placing the dues in an escrow account was unlawfully motivated.

Although the notice quoted above is somewhat inartfully worded, we find that the Respondent's intent was not to retaliate against the employees because of the Union's filing of the charge, but was simply to safeguard disputed dues on the advice of its attorney. The Respondent was not attempting to penalize employees who supported the Union, but was endeavoring to protect itself from additional liability should the Board determine, as the Board has in fact here determined, that In Stitches was the alter ego of RCR Sportswear and therefore bound by the collective-bargaining agreement. Although we agree with the judge that the failure to remit the dues to the Union violated Section 8(a)(5), we find no additional violation of Section 8(a)(3) or (4) in the Respondent's placing the disputed union dues in escrow pending the outcome of this case.[11]

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 5 and renumber the following paragraph.

''5. By constructively discharging employees because of their membership in or activities on behalf of the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.''

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to offer employees Catherine Onerato, and all other employees who are determined at the compliance stage of this proceeding to have been constructively discharged, immediate and

[7] We are not suggesting that employees are privileged to quit their employment whenever there is alleged a mere breach of a collective-bargaining agreement.

[8] Contrary to the Respondent's contention, we find that this statement was not ''clarified'' by the subsequent remark in the affidavit that ''I did not tell them that they could not be represented by the ILGWU or any other union,'' because the latter is simply too ambiguous to serve as a clarification.

[9] The identity of these employees can be determined at the compliance stage of this proceeding.

[10] The General Counsel cites, inter alia, *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[11] The notice to employees was not alleged to be an independent violation of Sec. 8(a)(1) of the Act.

full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings or other benefits they may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall order the Respondent to make unit employees whole for any loss of earnings and other benefits resulting from its repudiation of the collective-bargaining agreement. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, supra. Further, the Respondent shall remit to the Union the dues which it is holding in escrow, with interest as prescribed in *New Horizons for the Retarded*, supra, and make the payments as required by its collective-bargaining agreement to the various benefit funds retroactive to September 14, 1992, to the extent that such payments have not been made. Any additional amounts due the employee benefit funds shall be paid as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent shall also reimburse the unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required benefit payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra.

We shall also order the Respondent to grant access to union representatives as required by its collective-bargaining agreement.

ORDER

The National Labor Relations Board orders that the Respondent, RCR Sportswear, Inc., and its alter ego In Stitches, Inc., Passaic, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to honor the terms and conditions of the collective-bargaining agreement that is in effect until May 31, 1994, between RCR Sportswear, Inc., In Stitches, Inc., and Local 158, International Ladies Garment Workers Union, AFL–CIO.

(b) Denying access to union representatives as required by the collective-bargaining agreement.

(c) Failing to remit union dues to the Union as required by the collective-bargaining agreement.

(d) Constructively discharging employees because of their membership in or activities on behalf of the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union and make whole unit employees for any loss of earnings and other benefits resulting from the Respondent's repudiation of that agreement and its unlawful unilateral changes, in the manner set forth in the remedy section of this decision.

(b) Grant access to union representatives as required by the collective-bargaining agreement.

(c) Remit to the Union the union dues which are held in escrow with interest in the manner set forth in the remedy section of this decision.

(d) Remit the benefit fund payments which have become due and reimburse unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required payments, in the manner set forth in the remedy section of this decision.

(e) Offer immediate and full reinstatement to Catherine Onerato and all other employees who, at the compliance stage of this proceeding, are found to have been constructively discharged, to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed and make them whole for any loss of pay and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful constructive discharges and notify the employees in writing that this has been done and that the constructive discharges will not be used against them in any way.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(h) Post at its facility in Passaic, New Jersey, copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and main-

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

tained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to honor the terms and conditions of the collective-bargaining agreement that is in effect between RCR Sportswear, Inc., In Stitches, Inc., and Local 158, International Ladies Garment Workers Union, AFL–CIO. The term of that agreement runs until May 31, 1994.

WE WILL NOT deny access to union representatives pursuant to our collective-bargaining agreement.

WE WILL NOT fail and refuse to remit union dues to the Union as required by our collective-bargaining agreement.

WE WILL NOT constructively discharge employees because of their membership in or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect the terms and conditions of employment contained in the collective-bargaining agreement that is currently in effect between RCR Sportswear, Inc., In Stitches, Inc., and Local 158, International Ladies Garment Workers Union, AFL–CIO and make whole unit employees for any loss of earnings and other benefits resulting from our repudiation of the agreement.

WE WILL grant access to union representatives as required by our collective-bargaining agreement.

WE WILL remit to the Union with interest the union dues which have been held in escrow.

WE WILL remit the benefit fund payments which have become due and reimburse unit employees for any expenses ensuing from our unlawful failure to make the required payments.

WE WILL offer immediate and full reinstatement to Catherine Onerato and all other employees who were constructively discharged to their former positions or, if those postions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful constructive discharges and notify the employees in writing that this has been done and that the constructive discharges will not be used against them in any way.

RCR SPORTSWEAR, INC., AND IN STITCHES, INC.

William E. Milks, Esq., for the General Counsel.
Theodore M. Simon, Esq., for the Respondents.
Joseph S. Fine, Esq. (Reitman, Parsonnet & Duggan), for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on January 12, 1993. The charge was filed on October 15, 1992, and the complaint issued on November 27, 1992. The complaint as amended at the hearing alleged in substance:

1. That RCR Sportswear, In Stitches, Inc., and their shareholders, Anthony Ribaudo and Daniel Ribaudo, are alter egos.

2. That In Stitches, Inc., which began operations on September 14, 1992, is bound to the same collective-bargaining agreement that had been binding upon RCR Sportswear before that company purportedly went out of business on September 11, 1992.

3. That In Stitches has failed and refused to abide by the terms and conditions of the collective-bargaining agreement. Also that the Respondent has deducted union dues but instead of forwarding them to the Union, has put them in escrow.

Although conceding that In Stitches is a successor to RCR, the Respondent, contends that it is not an alter ego. Therefore, although arguing that In Stitches has an obligation to bargain with the Union (which it has offered to do), it denies that it is obligated to adopt and abide by the contract that was in existence between RCR and the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Anthony Ribaudo and Daniel Ribaudo, and their father before them, have been involved in the garment industry for many years. (The father retired from the business in 1977.) They also have had a longstanding collective-bargaining relationship with the Union covering the workers who worked at RCR, a company which acted as a contractor in that industry.

RCR was located at 183 Monroe Street, Passaic, New Jersey. Its two shareholders and officers were Anthony and Daniel Ribaudo. The building at Monroe Street and the equipment used by RCR (sewing machines, etc.), is owned by a corporation named Perfay, Inc. The latter corporation was established by the father in the 1960s to hold title to real estate. Since about 1975 when RCR transferred title of 183 Monroe Street to Perfay, RCR has paid rent to it at the rate of about $3000 per month. (A mortgage on this property is secured in part, by liens on the residences of Anthony and Daniel Ribaudo.) Perfay was formed long before the instant dispute arose and never had any employees. There was no suggestion or evidence to show that Perfay was established as a device to defraud or evade any of the obligations that RCR had either to the Union, to its employees, or to any other creditors. In fact, as business turned bad, the Ribaudos, in an effort to keep RCR operational, had Perfay waive the collection of rent from RCR from about February or March 1992. Also, in July 1992, the Ribaudos issued a check from Perfay in the amount of $1200 to cover RCR's payroll taxes.

The Ribaudos also owned another company called End Run Inc., which acted as a garment industry manufacturer and was also located at 183 Monroe Street. In this capacity, the Ribaudos solicited work from retail customers and pursuant to garment industry tradition, End Run did not actually do any manufacturing. Instead, when sales were made, End Run subcontracted out the making of the garments to contractors. No doubt because of the relationship of the two companies, RCR did much of the contracting work for End Run.

Apart from a commissioned salesman, End Run did not employ any other workers. In the period relevant to this proceeding, End Run did not have a contract with the Union. As in the case of Perfay, the evidence shows that End Run was established long before the present dispute arose. There was no evidence or suggestion that End Run was established or operated in a manner to evade any of the obligations that RCR had to the Union, to employees, or to other creditors.

RCR was a member of an employer association which negotiated a collective-bargaining agreement on behalf of its member/employers with the Union. The most recent contract binding upon RCR, ran from June 1, 1991, through May 31, 1994. This agreement, among other things, provided for wage rates and required the Employer to make contributions on behalf of employees, to various benefit funds such as pension, welfare, and vacation funds. The agreement also required the Employer to deduct union dues from those employees who so authorized, and remit them to the Union. Finally, the agreement permitted union representatives to visit the factory and talk to employees about union related matters.

There does not appear to be any disagreement that times have not been good in the garment industry. This is partly because of the recession, partly because of imported goods, and partly because of competition from nonunion firms. The evidence establishes that both Anthony and Daniel Ribaudo, during 1991 and 1992, lent RCR approximately $103,000 from their personnel assets so that the Company could continue to operate and pay its work force. There is no evidence that they were ever repaid or have any hope of being repaid.

As a consequence of its financial condition, RCR during 1991 and 1992, defaulted on payments to the contractually required benefit funds. The Union, as the representative of the employee beneficiaries of these funds properly and successfully instituted arbitration proceedings to collect these moneys.

On February 2, 1992, the Union secured a judgement against RCR for the amount of $57,277. On April 29, 1992, the Company advised the Union that because of its financial condition it wanted to meet with the Union and negotiate relief from the terms of the collective-bargaining agreement. The Union responded on May 8, 1992:

> It is the position of the Union that a meeting with RCR would not be productive. There have been several meetings in the past, all of which led to compromises in favor of the company. In each instance, the principal of RCR failed to comply with his commitments.
>
> I have been instructed to make whatever efforts are possible to collect the outstanding obligations.

On July 7, 1992, RCR filed a petition in bankruptcy seeking to reorganize its business pursuant to the provisions of Chapter 11. At that point, RCR listed debts of $87,000 of which at least $60,000 was owed to the Union's benefit funds on behalf of employees. RCR listed its assets as being worth about $6000.

On July 17, 1992, RCR filed with the bankruptcy court a petition for interim relief pursuant to Section 1113(e) of the Bankruptcy Code. In essence, it requested that the court set aside the collective-bargaining agreement. The Union opposed this petition because in its view, the relief would not save the Company and would undermine the existing collective-bargaining agreements it had with other employers in the garment industry.

On August 19, 1992, the court granted RCR partial relief. RCR was allowed to pay overtime rates after 40 hours of work and it was allowed to defer putting into effect a 4-percent wage increase that was supposed to occur in June 1992. (The Ribaudos also took a cut in pay.)

On September 4, 1992, the Ribaudos filed to convert the Chapter 11 petition into a Chapter 7 petition. That is, they decided to liquidate RCR and asked the bankruptcy court for permission to do so. In the application, Anthony Ribaudo stated:

> Relief is insufficient to allow the debtor to continue in business and, in fact debtor is unable to pay the continuing costs of labor or, on the other hand, to procure

> business at sufficient price to allow debtor to pay the costs of labor required by the collective-bargaining agreement.
>
> . . . .
>
> Thus, it is clear that as a result of debtor's inability to decrease its labor costs, liquidation and termination of the business is the sole alternative that makes any economic sense. It is also clear to me that the chief creditor, the I.L.G.W.U., and its benefit funds, would be unwilling to compromise their claims against the debtor, even if at some point down the road, the court were to allow a rejection of the agreement pursuant to Sec. 1113(a) and (b). Under such circumstances, a reorganization plan would not be approved and the debtor would still have to go down the Chapter 7 road. It might as well be now.

The application to convert to Chapter 7 was granted on September 10, 1992.

During the week ending September 11, 1992, the employees were told that the Company was going to be closed but that a new company, In Stitches, would be opened on Monday, September 14, 1992. The employees were told by Anthony Ribaudo that they could go to work for the new company but that although their wage rates would remain the same, they would not get the other union benefits.

On September 11, 1992, RCR was officially closed and on September 14, In Stitches was officially opened. In Stitches, whose two shareholders and officers are Anthony and Daniel Ribaudo, is located at 183 Monroe Street, and is engaged in exactly the same business as RCR. It uses the same machinery and has the same customers. When it commenced operations, the In Stitches' work force consisted of about 85 percent to 90 percent of the employees who worked for RCR. Anthony Ribaudo stated in his pretrial affidavit that In Stitches was formed

> because it was the only business myself and my brother knew. RCR could not survive with its current union obligations, and we could not get relief from the union or the Bankruptcy Court. I knew we could only be competitive by not having to pay union contract obligations.

Hearing from employees, Union Representative Vincenza Ramirez called Daniel Ribaudo on September 11, 1992, and asked what was happening. She was told that the employees would be offered jobs at In Stitches on Monday which was going to operate as a nonunion company. On Monday, September 14, when she sought to speak to the employees at the factory, Daniel Ribaudo refused her access, asserting that as In Stitches was a nonunion firm, she had no visitation rights.

On October 19, 1992, In Stitches offered to recognize and bargain with the Union for a new contract. The Union responded that it was their position that In Stitches was bound to the existing contract between it and RCR.

In December 1992, Ramirez again attempted to visit the employees at the factory premises but was denied access.

Also in December 1992, In Stitches, pursuant to its attorney's advice, withheld union dues from employees for the months of October and November 1992 in the amount of $70 per employee. Instead of remitting this money to the Union, it placed them in an escrow account pending the outcome of this case.

III. ANALYSIS

What is perhaps unusual about this case, is the candor and lack of subterfuge which the Ribaudos engaged in when they closed RCR and opened In Stitches. They did not attempt to hide their actions either from the employees, the Union, or the Government when this charge was filed. In fact, they have been open and aboveboard in stating their reasons for doing what they did. While this may be admirable from a moral point of view, I don't think that it affects the outcome of this case which, in my opinion, clearly establishes that In Stitches is an alter ego of RCR.

In *Advance Electric* 268 NLRB 1001, 1002 (1984), the Board stated that the test for determining alter ego status was:

> The legal principles to be applied in determining whether two factually separate employers are in fact alter egos are well settled. Although each case must turn on its own facts, we generally have found alter ego status where the two enterprises have ''substantially identical'' management, business purpose, operation, equipment, customers, and supervision as well as ownership. *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982). Accord: *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983). Other factors which must be considered in determining whether an alter ego status is present in a given case include ''whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead its purpose was to evade responsibilities under the Act.'' *Fugazy Continental Corp*., 265 NLRB 1301 (1982).

In *MIS, Inc*., 289 NLRB 491 (1988), the Board, citing *Advance Electric* stated that; ''No one factor is determinative of alter ego status, and not all of these indicia need be present to find that an alter ego relationship exists.''

The Respondent, I think, makes too much of the fact that in some cases, the Board or the courts have indicated that ''subterfuge'' was engaged in or that the new corporation was a ''disguised continuance'' of the old. See for example *NLRB v. O'Neill*, 140 LRRM 2557, 2562 (9th Cir. 1992). See also *Perma Coatings*, 293 NLRB 803 (1989). (No alter ego found where there was no substantial commonalty of ownership and no evidence of antiunion animus.)

It may be important in some cases to look at intent or motive in order to evaluate a set of facts that may, on the surface, be ambiguous. In many alter ego cases, the companies often make a greater effort to conceal their relatedness, for example, by transferring assets to a new company with relatives taking the place of the original owners. See *Kenmore Contracting Co*., 289 NLRB 336 (1988), and cases cited therein. In such cases where there has been at least an attempt to disguise common ownership and control, an inquiry into motivation may illuminate the true purpose of the transaction and show that it was not intended to be at arms length.

In the present case, the facts are not ambiguous. The shareholders, management, and business purpose of In Stitches is exactly the same as RCR. In Stitches continued operating, without hiatus, at the same location, using the same employees, the same equipment, and having the same customer base. Moreover, if one wishes to inquire into motivation, that

too is crystal clear; the owners of both companies desired to get out of the contractual obligations owed by RCR to the Union and to the various benefit funds established by its collective-bargaining agreement.

I also cannot accept the Respondent's argument that In Stitches is not an alter ego of RCR because of the intervening bankruptcy proceeding during which RCR was the debtor in possession. In *William B. Allen*, 267 NLRB 700, 706–707 (1983), enfd. 758 F.2d 1145 (6th Cir. 1985), cert. denied 474 U.S. 1101 (1986), the debtor in possession was held to be the alter ego of the respondent when the business was operated in the same manner and with the same employees as before the filing of a Chapter 11 petition. In *Cagle's Inc*., 218 NLRB 603 (1975), the Board held that a trustee in bankruptcy was deemed to be the alter ego of a debtor company. In *Century Printing Co.*, 242 NLRB 659, 666 (1979), enfd. 661 F.2d 914 (3d Cir., 1981), a new company was held to be the alter ego of a bankrupt company which was sold by the receiver-trustee to the family of the original owners and where those original owners, during and after the bankruptcy proceedings, continued to control the operations of the business.

Given the continuity of ownership and control, both before and after the bankruptcy proceedings, I do not see how those intervening events would affect the conclusion that In Stitches is the alter ego of RCR. I therefore conclude that In Stitches is bound to all of the terms and conditions of the collective-bargaining agreement binding on RCR, except to the extent that the banruptcy court may modify or alter its terms pursuant to the provisions of the bankruptcy law.[1] To the extent that the Respondent's defense is based on its financial condition, that claim is not one which is properly before the Board. In this regard, the appropriate procedure falls within the Bankruptcy Code and the Respondent may not escape its valid contractual obligations through the exercise of self-help.

The General Counsel asserts that the Ribaudos should be held individually liable for the debts of RCR which is a closely held corporation.

There are cases holding that the shareholders of a corporation are individually liable for the obligations of the corporation. Such cases may hold that the corporate veil will be pierced whenever it is employed to perpetrate fraud, evade existing obligations, or circumvent a statute. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). *Allen Hat Co*., 26 NLRB 937, 964 (1940), enfd. 116 F.2d 281 (8th Cir. 1940). Shareholder liability has been found where the individual shareholder participated in a scheme or plan of evasion, *NLRB v. Hopwood Retinning Co*., 104 F.2d 302, 304 (2d Cir. 1939), or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay. *NLRB v. Deena Artware*, 361 U.S. 398, 402–403 (1960). Additionally, the Board has found a stockholder to be individually liable where he has so integrated or intermingled his assets and affairs that ''no distinct corporate lines are maintained.'' *Campo Slacks*, 266 NLRB 492 fn. 1 and 500 at fn. 18 (1980).

In *Workroom For Designers*, 274 NLRB 840 (1985), the company's single shareholder was held to be individually liable where he had committed most of the ''numerous and egregious'' unfair labor practices. While noting that the company's owner had commingled personal and corporate assets and had disregarded corporate form, the Board stated; ''The most important factor in our resolution on this issue, however, is Sissleman's admission at the hearing that he planned to avoid any liability for backpay.'' Similarly, in *Air Vac Industries*, 282 NLRB 703 (1987), the evidence showed a propensity of the corporate owners not only to commingle assets but that they did so with the fraudulent intention of enriching themselves while depleting corporate assets to the detriment of their creditors.

It must be kept in mind, however, that these are the exceptions and not the rule. *NLRB v. Deena Artware*, supra. At 18A Am.Jur. 2d, § 850, at 721–730, the authors point out:

> Although corporate shareholders were not immune from liability for corporate debts or obligations at common law, shareholder insulation from such liability has been the cornerstone of corporate law in the United States since the 19th century, and virtually every state now has a statute limiting a shareholder's liability to the cost of the shares held.

The public policy rationale for this rule is to encourage men and women to establish business enterprises (and thereby give employment to their neighbors), by not requiring them to risk all of their own, and their families' personnel assets. It was recognized that the benefits to the public at large of such a rule would, on balance, outweigh the costs to those creditors who, on occasion, might be unable to collect debts that otherwise were due to them.

The general rule limiting liability applies to both large and small corporations; to public as well as closed corporations. The rule is as applicable to a candy store owner as it is to IBM. The exceptions to the rule are not meant to negate it insofar as small closed corporations are concerned. From my reading of the cases and treatises, the single most important factor in finding individual liability, in the absence of a specific statutory exception, is a determination that there has been some type of improper conduct by the shareholder which was designed to perpetrate a fraud on innocent parties so that the corporation's debts to them might be unjustly evaded. *NLRB v. O'Neill*, supra; *Stafford's Restaurant*, 271 NLRB 734 fn. 1 (1984); 18A Am.Jur. 2d, § 855, pp. 724 to 730.

The facts in the present case are not, in my opinion, sufficient to establish that Anthony and Daniel Ribaudo should be held personally liable for the potential liability of RCR and In Stitches.

Anthony and Daniel Ribaudo are the sole stockholders of RCR, its alter ego In Stitches, Perfay, and End Run. They did not hold corporate meetings on the occasions that they made corporate decisions, such formality being inappropriate for a small closed corporation owned by two brothers who meet each other every working day of their lives.

It was established that for a time there were three cars registered as being owned by RCR that were used as the personal cars of the brothers and their father. These were a 1981 Cadillac, a 1984 Cadillac, and a Chevrolet Blazer. This was

[1] Having terminated the Chapter 11 proceeding and converting it into a Chapter 7 proceeding, it is questionable as to whether the interim relief granted by the court on July 21, 1992, would still be applicable.

the only evidence of any corporate assets being used by the Ribaudos for nonbusiness use. In my opinion, this is not significant.

The General Counsel contends that there has been comingling of personal and corporate assets and therefore the Ribaudos should be individually liable. In this case, the evidence, apart from the three cars, shows that in 1990 and 1991, the Ribaudos lent about $103,000 to RCR and also caused, in 1992, moneys to be transferred from Perfay to RCR. (In the latter case largely by waiving rent payments.) This money was lent or transferred into RCR in an effort to have that company survive and pay its employees and its creditors. Unlike the cases cited above, the transactions here were not designed to transfer money *out of* RCR in order to enrich the Ribaudos and to avoid payment to RCR's creditors. Indeed the purpose behind the money transfers here was exactly the opposite of the types of transactions that typically occur when the stockholders of a failing corporation are intent on saving their own skins by defrauding the corporations's creditors.

The General Counsel argues that unless I hold the Ribaudos personally liable, the remedy to the violations will not be effective. In this regard, I shall order that In Stitches be obligated to honor the applicable collective-bargaining agreement and that the order be binding on any successor, assign, or alter ego of the Respondent. If the Ribaudos are able to stay in business at all, any company they own and operate in similar fashion will be bound to this Order and I don't think that an order holding them individually liable will add anything to the standard remedy appropriate for alter ego cases.

CONCLUSIONS OF LAW

1. In Stitches, Inc., is the alter ego of RCR Sportswear, Inc. and is bound to honor the collective-bargaining agreement between RCR Sportswear, Inc., and Local 158, International Ladies Garment Workers Union, AFL–CIO.

2. By failing and refusing to honor the collective-bargaining agreement described above, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act.

3. By denying access to union representatives in accordance with the terms of the aforesaid contract, the Company violated Section 8(a)(1) and (5) of the Act.

4. By failing to remit union dues to the Union, the Company violated Section 8(a)(1) and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent be ordered to make the required payments to the various benefit funds since September 14, 1992, to the extent such payments have not been made. Moreover, it is recommended that such payments to these funds be made with interest to be computed according to the practice set forth in *Merryweather Optical Co.*, 240 NLRB 12l3, 12l6 fn. 7 (l979).

[Recommended Order omitted from publication.]